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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-374

ERIKA OLUND,
Plaintiff-Appellee,
vs.
RUSSELL L. SWARTHOUT,
Defendant-Appellant.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Erika Olund prays that the Petition for a Writ of Certiorari filed in the captioned matter by Russell L. Swarthout, Defendant-Appellant, be denied.

OPINION BELOW

Accepted as set forth in the Petition.

JURISDICTION

Accepted as set forth in Petition.

QUESTIONS PRESENTED

1. Did the Defendant preserve his right to Jury Trial as required by Rules 38 (b) and 38 (d) of the Federal Rules of Civil Procedure, the reasonableness and constitutionality of which is not in issue; viz, was Demand timely filed?

2. Assuming the Defendant's Demand for Jury Trial was not timely filed, did the Trial Court abuse its discretion in denying Defendant's Motion for Jury Trial on all issues, or solely on the issue of the release; said discretion being granted by Rule 39 (b) of the Federal Rules of Civil Procedure?

3. Did Defendant's omission to use his timely remedy and file a Petition for Writ of Mandamus to obtain a Jury Trial, followed by his proceeding to the trial which lasted five days and involved great preparation, time and expense to the parties and to the State, and the time and travel of numerous witnesses including two medical experts, make unavailable to him the delayed remedy of review which he now seeks?

CONSTITUTIONL PROVISIONS INVOLVED

Accepted as stated in the Petition for Writ of Certiorari.

STATUTES INVOLVED

Accepted as stated in the Petition for Writ of Certiorari, but adding thereto

Federal Rules of Civil Procedure, Rule 38 (d), 28 U.S.C.A.:

> (d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5 (d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

Federal Rules of Civil Procedure, Rule 8 (c), 28 U.S.C.A.:

> (c) Affirmaitive Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

STATEMENT OF FACTS

Plaintiff filed her Complaint alleging a brutal and intentional and damaging violence inflicted upon her, the filing date thereof being December 28, 1964, jurisdiction being based on diversity of citizenship and an amount in controversy exceeding $10,000.00. Defendant appeared by Counsel on December 29, 1964. On March 15, 1965, a substitution of a second and new Attorney for Defendant was filed. An Amended Complaint was filed May 3, 1965; Answer thereto was filed May 24, 1965, which substantially denied all alle-

gations, but set forth no affirmative defense; no Demand for Jury Trial was filed at any time until as later recited herein. Seventeen entries on the docket then following intervene relating largely to discovery, until more than three years later on June 24, 1968, the Pre-Trial was had. Then on June 27, 1968, the "Amendment to Answer with Exhibit", alleging the affirmative defense of an allegedly valid written release dated March 1, 1963, was filed, and the next docket entry is on July 5, 1968 and reads "Plaintiff's Reply to Defendant's Amendment to Answer and Exhibit Filed". On July 18, 1968, Defendant filed a Motion to Strike Plaintiff's Reply, and a Motion to Dismiss, and for Hearing in advance of trial. On July 18, 1968, Notice of Trial for November 12, 1968 had been filed. On September 9, 1968, in open Court by agreement of the parties, the Court withdrew Defendant's Motion and entered no Order, but Plaintiff's Attorney agreed to file another Reply if such Order were entered after approval by Plaintiff's Counsel and signing by the Court. AFTER these proceedings and on the same date, September 9, 1968, the Defendant filed another substitution for a third and new Attorney. On November 8, 1968 Trial was adjourned without date at request of Counsel. Between September 9, 1968 and April 14, 1969, four depositions, preparatory to trial, were taken in Florida and filed with the Court in Detroit, Michigan. The Docket discloses on April 14, 1969, the following entry "Motion to Dismiss or Assess Costs and Motion to Strike Plaintiff's Reply to Amended Answer heard and denied—reply to be filed by Plaintiff in 30 days; motion of Defendant to require Plaintiff to post security bond for costs heard and granted—Court orders $500.00 security bond to be posted." On May 14, 1969 the Bond was filed, and also an Amended Reply to Defendant's Amendment to Answer was filed, which attempted to be more concise. (Com-

pare the two replies, being each set forth in the Appendix hereto). On May 23, 1969 Defendant filed his Demand for Jury Trial, and then on May 27, 1969 Defendant filed a Motion for Jury Trial on all issues, and after hearing thereon held on July 7, 1969, then on September 18, 1969 Judge Thornton made and entered his Order Denying the Motion for Jury Trial. Thereafter, four trial depositions were taken, and filed; the trial once again adjourned at request of Counsel, Notice of Trial for December 16, 1969 was filed on November 14, 1969; no further delay was sought or granted; Trial started at 9:00 A.M. on Monday, December 16, 1969, both parties indicating they were ready for trial, and trial continued without interruption through December 23, 1969. On April 16, 1971, the Court filed its Memorandum of Decision, findings of fact and conclusion of law, and on June 9, 1971, Judgment was entered on the decision.

The following significant documents which support the above statement of facts are printed in the Appendices to this Brief, labelled as follows:

Appendix A—Docket of Trial Court.....Page 1a

Appendix B—Defendant's Amendment to Answer .....Page 7a

Appendix C—Plaintiff's Reply to Defendant's Amendment to Answer*.....Page 9a

Appendix D—Plaintiff's Amended Reply to Defendant's Amendment to Answer** .....Page 13a

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* and **—the copy of Plaintiff's Reply appearing at page 5a of Swarthout's Petition for Certiorari does not accurately reflect the Exhibit which was attached to both Plaintiff's Reply and Plaintiff's Amended Reply in that it deletes what Mrs. Olund initially typed, and which she was forced to *strike out* by the two Judges (Swarthout and O'Connell) who witnessed the alleged release.

Appendix E—Defendant's Demand for Jury Trial filed May 23, 1969.....Page 16a

Appendix F—Excerpt from Defendant's Motion to Strike filed April 1, 1969, being final paragraph and prayer thereof .....Page 16a

Appendix G—Excerpt from Defendant's Memorandum Brief in Support of Motion to Strike Plaintiff's Reply to Defendant's Amendment to Answer filed April 1, 1969, being last paragraph and final prayer thereof .....Page 17a

Appendix H—Trial Court's Order Denying Motion for a Jury Trial.....Page 18a

REASONS THE WRIT SHOULD BE DENIED

1. For the reason assigned by the unanimous decision of the Sixth Circuit Court of Appeals, and is so clearly established by a comparison of the Reply and the Amended Reply:

> "The Amended Reply, introduced no new issues into the action. The issue of release was asserted and joined in July, 1968". *Olund v. Swarthout*, 459 F. 2d 999.

2. For the additional reason assigned by the Trial Court, and not repudiated by the Sixth Circuit Court of Appeals, in its opinion

> "During the course of this litigation there have been multiple court hearings held in the matter, and at all times the defendant has been represented by extremely competent counsel. Pretrials have been held, amendments have been filed, the defense of release was first injected into the litigation in June

of 1968, and the real issues to be litigated have been a matter of knowledge to respective counsel since the inception of the lawsuit, with the result that the time for demanding a jury 'has long since passed away' and, accordingly, the motion for a jury trial is denied."

3. Neither the Sixth Circuit Court's nor the Trial Court's Opinion make any statements that would require a Court to conclude that there were not also other good reasons for their decisions.

4. For the reason that this Defendant had ample time to file a Petition for Mandamus and resolve this question prior to trial, but, in fact, appeared for trial, stated he was ready, and proceeded through five days of trial, costly to the parties, the State and the numerous citizens who testified.

5. The authorities quoted by the Trial Court and the Sixth Circuit Court of Appeals most amply sustain the action of those Courts, and reference is made to them as set forth in the Appendix to this Brief.

6. To grant Defendant the relief he now seeks at this stage of the proceedings would cast an intolerable financial strain on the Plaintiff, resulting directly from this Defendant's own delays and omissions, and in reality make Rule 38 (d) and also Rule 8 (c) of Federal Rules of Civil Procedure a dangerous trap on which no Court or citizen could rely. The rule should not be allowed to be subject to the devious delays and withholding of known issues, as was clearly done in this case. A party should be entitled to know at an early date whether he or she is faced with the greater time, burden and expense and differing problems that are involved in a Jury Trial.

7. Because in truth, even if this Defendant could extend his time for filing a Demand for Jury Trial by either

withholding a known valid issue, or by creating at a later date a weak or fictitious affirmative defense, then the case would be at issue when the *added affirmative defense (here release) was filed,* as no reply is permitted or required in the absence of an Order of the Court requiring the same, as is expressly provided in Rule 7 (a) of the Federal Rules of Civil Procedure; and a Court speaks only through its Orders, and Petitioner can show no express Order requiring Plaintiff to file either the originally filed Reply nor the Amended Reply. Harmless surplusage permitted by the Court should not extend the time, particularly in view of the other compelling reasons recited.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied, and there should be awarded to respondent, Erika Olund, such costs and fees as are allowed by law and rule of this Court.

Respectfully submitted,

GEORGE F. FISK
Attorney for Plaintiff-Appellee
2060 Coolidge Highway
Berkley, Michigan 48072
LIncoln 6-3636

APPENDIX A

DOCKET ENTRIES

1964

Dec. 28. Filing fee of $15.00 received.
Dec. 29. C.D. 125 $15.00 disbursed.
Dec. 28. Complaint and bill of particulars, filed.
Dec. 29. Appearance filed.
Dec. 29. Stip. and motion to suppress with affidavit filed.
Dec. 30. Notice of taking deposition with proof of service filed.

1965

Jan. 4. Objections to inadequate and unreasonable "Notice of taking of deposition" of ptf., etc., filed.
Jan. 4. Temporary Restraining Order filed, and entered. Thornton, J.
Jan. 4. Summons filed.
Jan. 4. Motion to suppress adj. w/o date. Hearing on temporary restraining order. Temporary restraining order as to taking of ptf's deposition is granted. Thornton, J.
Jan. 5. Hearing had on objections to temporary restraining order. Thornton, J.
Jan. 11. Objections to taking of depositions, etc., adj. to Jan. 25/65. Thornton, J.
Jan. 18. Motion to dismiss with affidavit filed.
Jan. 20. Proof of service filed.
Jan. 25. Objections to taking deposition adj. to Feb. 8/65.
Feb. 1. Motion to dismiss adj. to Feb. 8/65.
Feb. 8. Objections to taking deposition and motion to dismiss adj. to Feb. 15/65.

Feb. 15. Motion to dismiss and objections to taking deposition, adj. to Mar. 8/65.

Mar. 8. Motion to dismiss and objections to taking deposition, adj. to Mar. 15/65.

Mar. 15. Motion and order permitting substitution of counsel for deft., filed and entered.

Mar. 15. Appearance of deft. filed.

Mar. 15. Consent to substitution filed.

Mar. 15. Motion to dismiss and objections to taking deposition adj. to Apr. 19/65.

Apr. 19. Motion to dismiss and objections to taking deposition adj. to May 3/65.

May 3. Amended complaint filed.

May 3. Motion to dismiss denied. Objections to taking deposition heard. Matter held in abeyance until interrogatories are submitted, Thornton, J.

May 10. Order dismissing deft's motion to dismiss w/o prejudice filed and entered. Thornton, J.

May 24. Answer to amended complaint filed.

June 16. Motion to require ptf. to post a security cost bond filed—Hearing June 2.

Aug. 23. Motion to require ptf. to post a security cost bond heard and denied. Thornton, J.

Aug. 27. Order denying deft's motion to require ptf. to post a security cost bond, filed and entered. Thornton, J.

Sept. 2. Deft's motion for physical and mental examination of ptf. pursuant to rule 35, filed. Hearing Sept. 13/65.

Sept. 13. Motion for physical and mental examination of ptf. adj. to Sept. 27/65. Thornton, J.

Sept. 27. Order for physical and mental examination of ptf., filed and entered. Thornton, J.

Dec. 21. Deft's interrogatories to ptf., filed.

1966

Apr. 7. Stip. and order extending time for ptf. to file ptf's sworn answers to deft's written interrogatories dated Dec. 20/65, filed and entered. Thornton, J.

Apr. 28. Written interrogatories propounded by ptf. to deft. pursuant to Federal Civil Rule 33, filed.

Apr. 28. Ptf's sworn answers to deft's written interrogatories propounded by deft. under date of Dec. 20/65, filed.

May 13. Deft's objections to written interrogatories propounded by ptf. pursuant to Fed. Civil Rule 33 and proof of service, filed.

May 18. Stip. and order to extend time, file interroga tories and to adjourn hearing on objections to June 13/66, filed and entered. Thornton. J.

May 23. Deft's objections to written interrogatories adj. to June 13/66. Thornton, J.

May 26. Answers of deft. to interrigatories of ptf., filed.

June 2. Ptf's response to: deft's objections to written interrogatories propounded by ptf. pursuant to F.C.R. 33, filed.

June 13. Hearing had on objections to written interrogatories and adj. to Sept. 12/66. Thornton, J.

Sept. 12. Hearing had on objections to written interrogatories and adj. to Sept. 26/66. Thornton, J.

Sept. 26. Objections to interrogatories heard in part and adj. without date. Thornton, J.

1968

June 7. Notice of pre-trial conference for June 17/68, filed.

June 17. Pre-trial adj. to June 24/68. Thornton, J.

June 24. Pre-trial had. Thornton, J.

June 27. Amendment to answer and exhibit, filed.

July 5. Ptf's reply to deft's amendment to answer and exhibit, filed.

July 18. Deft's motion to strike ptf's reply to deft's affirmative defense and motion to dismiss pursuant to instant request for a hearing in advance of trial of special and affirmative defense, filed. Hearing Aug. 19/68.

July 18. Notice of trial for Nov. 12/68, filed.

Aug. 19. Motion to strike and dismiss adj. to Sept. 9/68. Thornton, J.

Sept. 9. Stip. and order for substitution of attorney for deft., filed and entered. Thornton, J.

Sept. 9. Consent substitution of attorneys for deft., filed.

Sept. 9. Deft's motion to strike ptf's reply to deft's affirmative defense withdrawn by Court—ptf. will submit another reply. Thornton, J.

Nov. 8. Trial adj. without date, request of counsel. Thornton, J.

1969

Feb. 17. Notices of taking deposition with proofs of service (4), filed.

Mar. 17. Deposition of Erika Olund, filed.

Apr. 1. Deposition of Dr. Bernard David Abel, filed.

Apr. 1. Motion to dismiss complaint or in the alternative to assess costs, with supporting affidavit, exhibits, memorandum and proof of service, filed. Hearing Apr. 14/69.

Apr. 1. Motion to require ptf. to post security bond for costs with supporting brief, and proof of service filed. Hearing Apr. 14/69.

Apr. 1. Motion to strike ptf's reply to deft's Amendment to Answer with supporting brief, affidavit and proof of service filed. Hearing Apr. 14/69.

Apr. 2. Deposition of Charles G. Lynch, Jr., filed.

Apr. 2. Deposition of Thomas J. Spurlock, filed.

Apr. 14. Motion to dismiss or assess costs and motion to strike ptf's reply to amended answer heard and denied—reply to be filed by ptf. in 30 days; motion of deft. to require ptf. to post security bond for costs heard and granted—Court orders $500.00 security bond to be posted. Thornton, J.

Apr. 15. Order requiring ptf. to post security bond and allowing 30 days to file reply to amended answer, filed and entered. Thornton, J.

May 14. Bond for security for costs in $500.00, filed. Hanover Ins. Co., surety.

May 14. Ptf's amended reply to deft's amendment to answer and exhibit, filed.

May 23. Deft's demand for jury trial, filed.

May 27. Deft's motion for jury trial pertaining to all issues in the above entitled cause with supporting brief, filed. (Proof of service attached)

June 9. Motion for jury trial, etc. adj. to July 7/69 Thornton, J.

July 7. Motion for jury trial, heard and taken under advisement. Thornton, J.

July 15. Notice of trial for Nov. 4/69, filed.

July 16. Extraction from calendar of significant dates bearing on defendant's motion for order granting jury trial, filed.

Aug. 21. Notice of taking deposition (3) filed.

Sept. 2. Notice of taking deposition and proof of service, filed.

Sept. 18. Order denying motion for a jury trial, with exhibit, filed.

Sept. 18. Proof of mailing, filed.

Oct. 27. Motion for adjournment of trial, filed.
Oct. 27. Deposition of Russell L. Swarthout, filed.
Oct. 28. Motion for adj. of trial heard and granted. Thornton, J.
Oct. 29. Deposition of Delmar Stirrup, Robert Lee Sims and Erika Olund, filed.
Nov. 4. Trial adj. without date, request of counsel. Thornton, J.
Nov. 12. Order adjourning trial date. (Dec. 16/69), filed and entered. Thornton, J.
Nov. 14. Notice of trial for Dec. 16/69, filed.
Dec. 8. Subpoenas filed.
Dec. 16. Court trial begins—adj. to Dec. 17/69. Thornton, J.
Dec. 17. Court trial resumed—adj. to Dec. 18/69. Thornton, J.
Dec. 18. Court trial resumed—adj. to Dec 19/69. Thornton, J.
Dec. 19. Court trial resumed—adj. to Dec. 22/69. Thornton, J.
Dec. 22. Court trial resumed—adj. to Dec. 22/69. Thornton, J.
Dec. 23. Court trial resumed—matter taken under advisement—trial concluded. Thornton, J.
Dec. 30. Subpoenas filed.
Dec. 30. Subpoena filed.

1971

Apr. 16. Memorandum of decision—findings of fact—conclusions of law, filed and entered. Thornton, J.
Apr. 16. Proof of mailing filed.
June 9. Judgment on decision by the Court in favor of ptf. in $15,000.00 with interest (also re: payment) filed and entered. Thornton, J.

June 18. Transcripts commencing Dec. 16/69 in 3 vols., filed.
June 18. Transcript of July 7/69, filed.
July 2. Appeal fee of $5.00 received.
July 2. Deft's notice of appeal, filed.
July 6. C. D. 3 $5.00 disbursed.
July 6. Letter re: appeal, filed.
July 6. Proof of mailing filed.
July 19. Tax bill of costs, filed. (in $298.45)
Aug. 2. Stip. and order extending time to Sept. 10/71 to file record on appeal, filed and entered. Kaess, J.
Aug. 2. Transcript of June 24/68, filed.
Sept. 1. Notice of mailing file to CCA, filed.
Sept. 7. Acknowledgement filed.

APPENDIX B

DEFENDANT'S AMENDMENT TO ANSWER

(U. S. District Court—Eastern District of Michigan Southern Division)

(Filed June 27, 1968)

Pursuant to Federal Rules of Civil Procedure, No. 16, a pretrial conference having been considered and the necessity of amending the Answer appearing therein, Defendant, Russell Swarthout, by his attorney, Robert E. Childs, hereby adds (pursuant to Federal Civil Rule 8(c)), an additional Special and Affirmative Defense, as follows:

III.

March 1, 1963, plaintiff, Erika Olund, released for an adequate and valuable consideration any purported cause of action or claim she may have, a true copy of said "Re-

lease" being attached hereto and made a part hereof, thereby discharging defendant, Russell Swarthout, from any and all claims of any kind or nature whatsoever.

Wherefore, defendant Russell Swarthout, reiterates his original demand for judgment for cost.

/s/ Robert E. Childs
Attorney for Defendant

RELEASE

I, Erika Olund, of Miami, Florida, for and in consideration of One ($1.00) Dollar, to me in hand paid by R. Swarthout, do by these presents for myself, my heirs, executors and administrators, remise, release and forever discharge Russell Swarthout, of Detroit, Mich., his heirs, executors, and administrators, of and from any and all manner of action or actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, trespasses, damages, judgments, executions, claims, and demands whatsoever, in law or equity, which against him I have had, now have or which my heirs, executors, or administrators, hereafter can, shall, or may have, for or by reason of any matter, cause, or thing whatsoever.

I further state freely and voluntarily that Russell Swarthout has at no time ever committed any criminal act of violence towards me, or upon my being, of any nature whatsoever.

In witness whereof, I have hereunto set my hand and seal this first day of March, 1963.

/s/ Erika Olund

In the presence of:

Thomas G. O'Connell

APPENDIX C

PLAINTIFF'S REPLY TO DEFENDANT'S AMENDMENT TO ANSWER

(U. S. District Court—Eastern District of Michigan—Southern Division)

(Filed July 5, 1968)

In Reply to Defendant's Amendment to Defendant's Answer wherein is added what is therein described as "an additional Special and Affirmative Defense," and in accordance with the proceedings of the Court and the agreement of the parties at the Pre-Trial Conference held June 24, 1968, Plaintiff, by her Attorney, George F. Fisk, files this Reply; and Plaintiff says:

I.

Replying to Paragraph III, Plaintiff says that the said alleged Release is without legal effect or validity for the following facts and reasons:

(A)—That Plaintiff signed the alleged Release only because of the coercion and duress and undue influence exercised upon, and against her, as hereafter set forth;

(B)—That on the day or days shortly before the date of and the signing of the alleged Release, the Defendant and the Defendant's friend, agent and assistant, Thomas G. O'Connell (who later witnessed the alleged Release) had threatened and menaced Plaintiff with words to the effect that Plaintiff would lose her job and otherwise regret it if Plaintiff caused Defendant any

trouble at all; further, Plaintiff was convinced that these threats could be, and would be, carried out unless she complied with Defendant's wishes in the matter;

(C)—That Plaintiff signed the alleged Release when under great emotional strain; when in fear of the Defendant who had earlier treated her with great violence; also when in fear of Defendant's friend, agent and assistant who had earlier threatened her great harm; also at a time when Plaintiff was alone in her home with no counsel or friend to support or help her deal with Defendant and his friend and agent, both of whom were lawyers and judges at all times when they dealt with Plaintiff in reference to the signing of the alleged Release;

(D)—That at no time was there any effort at reasonable discussion or negotiation, but only the emotional and menacing demand and insistence that Plaintiff sign the single copy of the Release which the Defendant had brought with him, and that Plaintiff accept possession of the $1,000.00 cash which the Defendant had brought with him;

(E)—That Plaintiff requested a copy of the Release before signing, and one was hastily typed and signed by all present; when the signatures were obtained, the Defendant and his friend hurriedly left the premises; a "copy" of the second signed copy of the alleged Release is attached to this reply and made a part hereof;

(F)—That Plaintiff was at the time and place mentioned, *because* of the traumatic injury she had suffered from Defendant, because of the threats

and menaces made against her by Defendant and his friend, *because* of the quite incredulous and unsympathetic treatment she had received from the police, *because* of the knowledge that no attorney desired a case against another attorney, particularly when that other attorney was also a judge (and had friends who were judges), weakened, frustrated, fearful, and, hence, very susceptible to the type of coercion inflicted upon her;

(G)—The alleged Release, signed under the circumstances described, *was drafted by the Defendant, an Attorney,* and covers with great particularity all of the many types of causes and actions which it purports to release; it then has a clause which clearly establishes that the intent of the Release was not to, and did not, apply to one class of actions, namely, actions founded on "criminal acts of violence *** of any nature whatsoever"; and Plaintiff's Complaint in the captioned cause clearly falls within those excluded "criminal acts of violence *** of any nature whatsoever".

Wherefore, Plaintiff asks Judgment as prayed in the Complaint.

/s/ George F. Fisk
Attorney for Plaintiff
2060 Coolidge Highway
Berkley, Michigan 48072
LIncoln 6-3636

Dated: July 2, 1968, Berkley, Michigan.

RELEASE

I, Erica Olund of Miami, Florida, for and in consideration of One Dollar, to me in hand paid by r. Swarthout, do by these presents for myself, my heirs, executors and administrators, remise, release and forever discharge Russell Swarthout, of Detroit, Mich., his heirs, executors, and administrators, of and from any and all manner of action or actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties. covenants, contracts, controversies, agreements, promises, trespasses, damages, judgments, executions, claims, and demands whatsoever, in law or equity, which against him I have had, now have, or which my heirs, executors, or administrators, hereafter can, shall, or may have, for or by reason of any matter, cause, or thing whatsoever.

I further state freely and voluntarily that Russell Swarthout has at no time ever committed any criminal act of violence towards me, or upon my being, of any nature whatsoever. ~~The above statement is false. Russell Swarthout gave me a large sum of money to sign his release.~~

In witness whereof, I have hereunto set my hand and seal this First day of March, 1963

/s/ Erika Olund

In the presence of:

R. L. Swarthout
T. G. O'Connell

**Mar 1, 1963—*

I, Russell L. Swarthout, will not proceed either civil or criminally against Erica Olund for any past acts or present acts as of this date.

/s/ R. L. Swarthout

---

* Italics indicate hand printed and/or handwritten material in original done by Russell L. Swarthout.

APPENDIX D

PLAINTIFF'S AMENDED REPLY TO DEFENDANT'S AMENDMENT TO ANSWER

(U.S. District Court—Eastern District of Michigan—Southern Division)

(Filed May 14, 1969)

In reply to Defendant's Amendment to Answer, wherein was added what is therein described as "an additional Special and Affirmative Defense", and in accordance with the Order of the Court dated April 14, 1969 made on Defendant's Motion to Strike Plaintiff's earlier Reply, and allowing Plaintiff thirty (30) days in which to file an Amended Reply, PLAINTIFF SAYS:

I.

Replying to Paragraph III, being the only paragraph in said Amendment, Plaintiff states the release pleaded by Defendant is void and without legal effect, for the following reasons:

(a)—Duress, coercion, fraud and undue influence practiced upon Plaintiff by the Defendant and his Agents by wrongful advice and statements, and by threats of harm to her person and property and legal rights;

(b)—A total and gross inadequacy of consideration;

(c)—A total lack of agreement and meeting of the minds as evidenced by, among other things, a second instrument dictated by the Defendant and typed by the Plaintiff, a copy of which is attached to this Re-

ply, which also excludes "Acts of violence" for which this action is brought;

(d)—Material unilateral mistake of the Plaintiff, who at the significant time was alone, ill, frightened, without friends or guidance or counsel, and believed it impossible for her to obtain interested professional counsel;

(e)—The alleged release contravenes public policy in that it was part of a plan to conceal a criminal offense; it violates a statute forbidding the concealment of crime;

(f)—The purported release contravenes the established interest of society against allowing the strong and learned of the professions from overpowering or intimidating the relatively weak and uneducated.

Wherefore, Plaintiff asks judgment as prayed in the Amended Complaint, together with any other different or equitable relief needful, just and appropriate in the premises.

/s/ George F. Fisk
Attorney for Plaintiff
2060 Coolidge Highway
Berkley, Michigan 48072
LIncoln 6-3636

Dated: May 13, 1969, Berkley, Michigan

RELEASE

I, Erica Olund of Miami, Florida, for and in consideration of One Dollar, to me in hand paid by r. Swarthout, do by these presents for myself, my heirs, executors and administrators, remise, release and forever discharge

Russell Swarthout, of Detroit, Mich., his heirs, executors, and administrators, of and from any and all manner of action or actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties. covenants, contracts, controversies, agreements, promises, trespasses, damages, judgments, executions, claims, and demands whatsoever, in law or equity, which against him I have had, now have, or which my heirs, executors, or administrators, hereafter can, shall, or may have, for or by reason of any matter, cause, or thing whatsoever.

I further state freely and voluntarily that Russell Swarthout has at no time ever committed any criminal act of violence towards me, or upon my being, of any nature whatsoever. ~~The above statement is false. Russell Swarthout gave me a large sum of money to sign his release.~~

In witness whereof, I have hereunto set my hand and seal this First day of March, 1963.

/s/ Erika Olund

In the presence of:
R. L. Swarthout
T. G. O'Connell

**March 1, 1963—*

I, Russell L. Swarthout, will not proceed either civil or criminally against Erica Olund for any past acts or present acts as of this date.

R. L. Swarthout

---

* Italics indicate hand printed and/or handwritten material in original done by Russell L. Swarthout.

APPENDIX E

DEMAND FOR JURY TRIAL

(U. S. District Court—Eastern District of Michigan—Southern Division)

(Filed May 23, 1969)

Now comes the Defendant, Russell L. Swarthout, by and through his attorney, William A. Bedrosian, and hereby demands a trial by jury of each and every issue in the above entitled cause, in accordance with Rule 38 (b) and (c) of the Federal Rules of Civil Procedure.

Dated: May 22, 1969.

/s/ William A. Bedrosian
Attorney for Defendant
3333 Cadillac Tower
Detroit, Michigan 48226
965-3888

APPENDIX F

EXCERPT FROM MOTION TO STRIKE PLAINTIFF'S REPLY TO DEFENDANT'S AMENDMENT TO ANSWER

(U S. District Court—Eastern District of Michigan—Southern Division)

(Filed April 1, 1969)

• • • • •

5. That a period of nine (9) months has in fact lapsed, and as of this date, Plaintiff has not filed her Amended Reply.

Wherefor, Defendant prays that Plaintiff's Reply to Defendant's Amendment To Answer be dismissed.

/s/ William A. Bedrosian
Attorney for Defendant

APPENDIX G

EXCERPT FROM MEMORANDUM BRIEF IN SUPPORT OF MOTION TO STRIKE PLAINTIFF'S REPLY TO DEFENDANT'S AMENDMENT TO ANSWER

(U. S. District Court—Eastern District of Michigan—Southern Division)

(Filed April 1, 1969)

• • • • •

In this particular case, Plaintiff in answering the Defendant's Amendment to Answer has merely filed a superfluous and repetitious pleading and has not properly answered Defendant's amended affirmative defenses.

Wherefore Defendant prays that Plaintiff's Reply To Defendant's Amendment To Answer be dismissed.

Respectfully submitted,

/s/ William A. Bedrosian
Attorney for Defendant

APPENDIX H

ORDER DENYING MOTION FOR A JURY TRIAL

(U. S. District Court—Eastern District of Michigan—Southern Division)

(Filed September 18, 1969)

At a session of said Court held in the Federal Building, Detroit, Michigan, on September 18, 1969.

Present: Honorable Thomas P. Thornton, United States District Judge.

On May 27, 1969, the defendant filed a motion for a jury trial in the within cause, grounding the said motion upon the following allegations:

> "1. That the above entitled cause was commenced on or about the 28th day of December, 1964. That thereafter the Complaint was amended by the Plaintiff
>
> 2. That subsequently on or about the 24th day of June, 1968, your Defendant filed an amendment to his answer setting forth as an affirmative defense a release.
>
> 3. That approximately nine (9) months later, on May 14, 1969, on order of this Honorable Court the Plaintiff did answer Defendant's amended answer.
>
> 4. That on the 23rd day of May, 1969, your Defendant filed a demand for a jury trial under Rule 38 (b) and (c) of Federal Rules of Civil Procedure requesting a trial by jury of each and every issue in this cause."

The plaintiff opposes said motion and has submitted, at the request of the Court, the pleading entitled "EX-

TRACTION FROM CALENDAR OF SIGNIFICANT DATES BEARING ON DEFENDANT'S MOTION FOR ORDER GRANTING JURY TRIAL", which is attached hereto as Exhibit 1.

Sleeman v. Chesapeake & Ohio Railroad Company, 263 F.Supp. 117 (W.D. Mich 1967) is authority for the following:

"In *Speed v. Transamerican Corp.,* 103 F. Supp. 47 (D.C.Del., 1952), the court said:

'It has been held a party waives his jury trial when he did not request such as to a count which was not a part of a complaint but which could be anticipated it may become part of the complaint. *Gulbenkian v. Gulbenkian,* 2 Cir., 147 F.2d 173, 158 A.L.R. 990. And *Fidelity Deposit Company* [*of Md.*] *v. Krout,* 2 Cir., 157 F.2d 912, decided that where a new count is based on the same issues as the previous counts as to which no jury was requested, that waiver would continue in effect also as to the new count.' 103 F.Supp. 47-48.

Also, in 2B Barron & Holtzoff, *Federal Practice and Procedure,* §873, pp 35-6 (Rules Ed., 1961), the following observation was made:

'Since amendments are freely allowable, it has been held that an amendment of a complaint may completely change the issues and entitles the parties to trial by jury in a case in which before amendment, there was no right of jury trial. But an amendment will not entitle the adverse party to demand a jury trial which he had earlier waived with full knowledge of the real issues to be litigated.'

Plaintiff's amendments have not changed the character of his suit; it remains as it was before. Defend-

ant could have demanded a jury when plaintiff filed his original complaint; however, having failed to do this, defendant cannot now resurrect a right which has long since passed away."

During the course of this litigation there have been multiple court hearings held in the matter, and at all times the defendant has been represented by extremely competent counsel. Pretrials have been held, amendments have been filed, the defense of release was first injected into the litigation in June of 1968, and the real issues to be litigated have been a matter of knowledge to respective counsel since the inception of the lawsuit, with the result that the time for demanding a jury "has long since passed away" and, accordingly, the motion for a jury trial is denied.

/s/ Thomas P. Thornton
United States District Judge.

EXHIBIT 1

EXTRACTION FROM CALENDAR OF SIGNIFICANT DATES BEARING ON DEFENDANT'S MOTION FOR ORDER GRANTING JURY TRIAL

(U.S. District Court—Eastern District of Michigan—Southern Division)

(Filed July 16, 1969)

As requested by the Court at the Hearing in Open Court held July 7, 1969, on the Motion of Defendant for Order Granting Jury Trial, Plaintiff now here sets forth in writing the significant dates extracted from the Court's Docket and referred to in Plaintiff's Counsel's oral argument on that date:

Docket No.	*Date Filed*	*Significant Pleading or Action*
1	December 28, 1964	Complaint filed
13	May 3, 1965	Amended Complaint filed
15	May 24, 1965	Answer to Amended Complaint filed
	(Case at issue then for three (3) years to Pre-Trial and no demand for Jury Trial filed by either party)	
28	June 7, 1968	Notice of Pre-Trial Conference filed Adjourned to June 24, 1968
	June 24, 1968	Pre-Trial had. No request for Jury Trial; but Defendant's request to Amend Answer Adding Affirmative Defense of Release was granted.
29	June 27, 1968	Amendment to Answer filed (adding Affirmative Defense of written release)
30	July 5, 1968	Plaintiff's Reply to Amended Answer filed
	(Case now again at issue and neither party requests Jury Trial)	

Docket No.	*Date Filed*	*Significant Pleading or Action*
32	July 18, 1968	Notice of Trial for November 12, 1968 filed
	(No demand for Jury Trial)	
	November 8, 1968	Trial adjourned without date at request of Counsel
44	April 15, 1969	Order Requiring Plaintiff to Post Security Bond and allowing thirty days to file Reply to Amended Answer
45	May 14, 1969	Bond filed
46	May 14, 1969	Plaintiff's Amended Reply to Defendant's Amendment to Answer and Exhibit filed
47	May 23, 1969	Demand for Jury Trial filed
48	May 27, 1969	Motion for Jury Trial filed

Plaintiff's position as stated in Court is as follows: (1) —due to the lapse of time and the circumstances outlined, both parties have waived their RIGHT to a jury trial, but the Court could grant a jury trial if there appeared, in its discretion, a compelling reason for doing so; (2)—the Plaintiff has for more than three and one-half years relied on the assumption that the case would not be tried by jury, and felt the best interests of the parties and society made a non-jury trial or other disposition preferable; (3)—to grant a jury trial now under these circumstances would probably make Rule 38 (b) meaningless, as a party could hold back an issue, as was done here, or even raise a false issue, and thus avoid the said Rule 38 (b), and its entire purpose and spirit.

/s/ George F. Fisk
Attorney for Plaintiff
2060 Coolidge Highway
Berkley, Michigan 48072
LIncoln 6-3636

Dated: July 16, 1969.